Table of Contents

Chapter 5
Foreign Relations

A. CONSTITUTIONALITY OF STATE LAWS CONCERNING IMMIGRATION

1. Arizona

As discussed in *Digest 2010* at 163-68, the United States sought and obtained a preliminary injunction barring enforcement of certain provisions of an Arizona law, S.B. 1070, in the U.S. District Court for the District of Arizona in 2010. On April 11, 2011, the U.S. Court of Appeals for the Ninth Circuit agreed with the district court's holding that those provisions of S.B. 1070 are preempted by federal immigration law and upheld the preliminary injunction. *United States v. Arizona*, 641 F.3d 339 (9th Cir. 2011). In the portion of the court's opinion excerpted below, the court considered foreign policy concerns about the Arizona law, with reference to the declaration by Deputy Secretary of State James B. Steinberg submitted by the United States in the district court. In December 2011, the United States Supreme Court granted certiorari in the case. *Arizona v. United States*, No. 11-182, 2011 WL 3556224 (2011).

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…[T]he record unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations, which weighs in favor of preemption. *See generally* [*Am. Ins. Ass'n v.*] *Garamendi*, 539 U.S. 396, 123 S.Ct. 274 [(2003)] (finding obstacle preemption where a State law impinged on the Executive's authority to singularly control foreign affairs); *Crosby* [*v. National Foreign Trade Council*], 530 U.S. 363, 120 S.Ct. 2288 [(2000)] (same). In *Garamendi*, the Court stated that "even ... the *likelihood* that state legislation will produce something more than *incidental* effect in conflict with express foreign policy of the National Government would require preemption of the state law." 539 U.S. at 420, 123 S.Ct. 2374 (emphasis added).

The record before this court demonstrates that S.B. 1070 does not threaten a "*likelihood* ... [of] produc[ing] something more than *incidental* effect;" rather, Arizona's law has created *actual* foreign policy problems of a magnitude far greater than incidental. *Garamendi*, 539 U.S. at 419, 123 S.Ct. 2374 (emphasis added). Thus far, the following foreign leaders and bodies have publicly criticized Arizona's law: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter–American Commission on Human Rights; and the Union of South American Nations.

In addition to criticizing S.B. 1070, Mexico has taken affirmative steps to protest it. As a direct result of the Arizona law, at least five of the six Mexican Governors invited to travel to

Phoenix to participate in the September 8–10, 2010 U.S.-Mexico Border Governors' Conference declined the invitation. The Mexican Senate has postponed review of a U.S.-Mexico agreement on emergency management cooperation to deal with natural disasters.

In *Crosby*, the Supreme Court gave weight to the fact that the Assistant Secretary of State said that the state law at issue "has complicated its dealings with foreign sovereigns." 530 U.S. at 383–84, 120 S.Ct. 2288. Similarly, the current Deputy Secretary of State, James B. Steinberg, has attested that S.B. 1070 "threatens at least three different serious harms to U.S. foreign relations." In addition, the Deputy Assistant Secretary for International Policy and Acting Assistant Secretary for International Affairs at DHS has attested that Arizona's immigration law "is affecting DHS's ongoing efforts to secure international cooperation in carrying out its mission to safeguard America's people, borders, and infrastructure." The Supreme Court's direction about the proper use of such evidence is unambiguous: "statements of foreign powers necessarily involved [,] ... indications of concrete disputes with those powers, and opinions of senior National Government officials are competent and direct evidence of the frustration of congressional objectives by the state Act." *Crosby*, 530 U.S. at 385, 120 S.Ct. 2288. Here, we are presented with statements attributable to foreign governments necessarily involved and opinions of senior United States' officials: together, these factors persuade us that Section 2(B) thwarts the Executive's ability to singularly manage the spillover effects of the nation's immigration laws on foreign affairs.

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2. Alabama

Subsequent to Arizona's enactment of S.B. 1070, several other states enacted similar laws directed at immigrants who may be present in those states unlawfully. On August 1, 2011, the United States filed a complaint in the U.S. District Court for the Northern District of Alabama, seeking:

> to declare invalid and preliminarily and permanently enjoin the enforcement of various provisions of House Bill 56, as amended and enacted by the State of Alabama, [("H.B. 56")] because those provisions are preempted by federal law and therefore violate the Supremacy Clause of the United States Constitution.

Complaint ¶ 1, *United States v. Alabama* (N.D. Ala. 2011), available at www.justice.gov/opa/documents/complaint-us-v-alabama.pdf.

As explained in the U.S. complaint, H.B. 56 is "sweeping" in its reach and seeks, among other things:

> to punish unlawful entry and presence by requiring, whenever practicable, the determination of immigration status during any lawful stop by the police where there is 'reasonable suspicion' that an individual is unlawfully present, and by establishing new state punitive and criminal sanctions against unlawfully present aliens.

Complaint ¶ 3.

The United States argued that various provisions of the Alabama law, reflecting the law's "enforcement-at-all-costs approach," Complaint ¶5, impermissibly interfere with federal immigration authority in several interrelated respects:

> H.B. 56 conflicts with and otherwise stands as an obstacle to Congress's demand for sufficient flexibility in the enforcement of federal immigration law to accommodate the competing interests of immigration control, national security and public safety, humanitarian concerns, and foreign relations—a balance implemented through the supervision and policies of the President and various executive officers with the discretion to enforce the federal immigration laws. *See* 8 U.S.C. § 1101 *et seq.* Enforcement of H.B. 56 would also effectively create state crimes and sanctions for unlawful presence despite the exclusive federal control over the consequences for unlawful presence and Congress's considered judgment to establish civil removal—and not criminalization or other punitive sanction—as the exclusive consequence of unlawful status. Alabama's punitive scheme would further undermine federal foreign policy, in that the federal government has—as a matter of mutual understandings—established that unlawfully present foreign nationals (who have not committed some other violation of law) should be removed without criminal sanction or other punitive measures and that the same treatment should be afforded to American nationals who are unlawfully present in other countries. H.B. 56 would thus interfere with federal policy and prerogatives in the enforcement of the immigration laws, and with the administration and enforcement of U.S. education laws.

Complaint ¶ 36.

Along with its motion for a preliminary injunction in this case, the United States submitted a declaration by Deputy Secretary of State William J. Burns, dated July 29, 2011, which discussed the United States' foreign policy concerns about H.B. 56 and comparable state laws. Deputy Secretary Burns' declaration is excerpted below and available in full at *www.state.gov/s/l/c8183.htm*. The district court granted the United States' motion for a preliminary injunction in part on October 13, 2011. *United States v. State of Alabama*, 2011 WL 4469941 (N.D. Ala.). The U.S. Court of Appeals for the Eleventh Circuit also granted in part the United States' motion for an injunction pending appeal. *United States v. State of Alabama*, 443 Fed. Appx. 411, 2011 WL 4863957 (11th Cir. 2011).

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5. … U.S. federal immigration law incorporates foreign relations concerns by providing a comprehensive range of tools for regulating entry and enforcement. These may be employed with sensitivity to the spectrum of foreign relations interests and priorities of the national government. By contrast, Alabama law H.B. 56 establishes an inflexible, state-specific immigration enforcement policy based narrowly on criminal sanctions that is not responsive to

these concerns, and that unnecessarily antagonizes foreign governments. If allowed to enter into force, H.B. 56 would result in lasting harm to U.S. foreign relations and foreign policy interests.

6. Through the Immigration and Nationality Act ("INA") and other federal laws, the national government has developed a comprehensive regime of immigration regulation, administration, and enforcement, in which the Department of State participates. This regime is designed to accommodate complex and important U.S. foreign affairs priorities—including economic competitiveness and trade, humanitarian and refugee protection, access for diplomats and official foreign visitors, national security and counterterrorism, criminal law enforcement, and the promotion of U.S. human rights policies abroad. To allow the national government flexibility in addressing these concerns, the INA provides the Executive Branch with a range of options governing the entry, treatment, and departure of aliens. Moreover, foreign governments' reactions to immigration policies and the treatment of their nationals in the United States impacts not only immigration matters but also any other issue on which we seek cooperation with foreign states, ranging from investment protection to tourism to defense. These foreign relations priorities and policy impacts are ones to which the national government is sensitive in ways that individual states are not.

7. By rigidly imposing a singular form of immigration enforcement through mandatory verification of immigration status and criminal enforcement of alien registration, H.B. 56 interferes with the national government's carefully calibrated policy of immigration regulation. The Alabama law also uniquely burdens foreign nationals by regulating, and in many cases criminalizing, work, travel, housing, contracting, and educational enrollment well beyond any restrictions imposed by U.S. law. These multiple, interlinking procedural and criminal provisions, adopted to supplant the federal regime and deter unlawfully present aliens from entering or residing in the State of Alabama, all manifest Alabama's intention to regulate virtually every aspect of those aliens' lives and to influence immigration enforcement nationwide. H.B. 56 thereby undermines the diverse immigration administration and enforcement tools made available to federal authorities, and establishes a distinct state-specific immigration policy, driven by an individual state's own policy choices, which risks significant harassment of foreign nationals, is insensitive to U.S. foreign affairs priorities, and has the potential to harm a wide range of delicate U.S. foreign relations interests.

8. Alabama's H.B. 56 also must be viewed in the context of the recent proliferation of stringent state laws addressed to the issue of immigration enforcement. Arizona enacted such a law, after which H.B. 56 was modeled in part, in April 2010; Utah enacted such a law in March 2011; Georgia and Indiana enacted such laws in May 2011; and South Carolina enacted such a law in June 2011. The first law in this series, Arizona's S.B. 1070, created significant difficulties for U.S. bilateral relationships with many countries, particularly in the Western Hemisphere, and provoked vociferous and sustained criticism in a variety of regional and multilateral bodies. Foreign governments and international organizations expressed serious concerns regarding the potential for discriminatory treatment of foreign nationals posed by S.B. 1070, among other issues. These same criticisms and concerns have been reasserted—and expanded upon—in response to the recent wave of state laws, including H.B. 56.

9. By deviating from federal immigration enforcement policies as well as federal rules governing work, travel, housing, contracting, and educational enrollment by foreign nationals, and by seeking to regulate virtually every aspect of certain aliens' lives, H.B. 56 threatens at least three different serious harms to U.S. foreign relations.

- *First,* H.B. 56 risks reciprocal and retaliatory treatment of U.S. citizens abroad, whom foreign governments may subject to equivalently rigid or otherwise hostile immigration regulations, with significant potential harm to the ability of U.S. citizens to travel, conduct business, and live abroad. Reciprocal treatment is an important concern in immigration policy, and U.S. immigration laws must always be adopted and administered with sensitivity to the potential for reciprocal or retaliatory treatment of U.S. nationals by foreign governments.
- *Second,* H.B. 56 antagonizes foreign governments and their populations, both at home and in the United States, likely making them less willing to negotiate, cooperate with, or support the United States across a broad range of foreign policy issues. U.S. immigration policy and treatment of foreign nationals can directly affect the United States' ability to negotiate and implement favorable trade and investment agreements, to secure cooperation on counterterrorism and counternarcotics trafficking operations, and to obtain desired outcomes in international bodies on priorities such as nuclear nonproliferation, among other important U.S. interests. Together with the other recently enacted state immigration laws, H.B. 56 is already complicating our efforts to pursue such interests. H.B. 56's impact is liable to be especially acute, moreover, not only among our critical partners in the region but also among our many important democratic allies worldwide, as those governments are the most likely to be responsive to the concerns of their constituents and the treatment of their own nationals abroad.
- *Third,* H.B. 56 threatens to undermine our standing in regional and multilateral bodies that address migration and human rights matters, and to hamper our ability to advocate effectively for the advancement of human rights and other U.S. values. Multilateral, regional, and bilateral engagement on human rights issues and international promotion of the rule of law are high priorities for the United States. Consistency in U.S. practices at home is critical for us to be able to argue for international law consistency abroad. By deviating from national policy in this area, H.B. 56 may place the United States in tension with our international obligations and commitments, and compromise our position in bilateral, regional, and multilateral conversations regarding human rights.

10. Furthermore, when H.B. 56 is considered in the context of the unprecedented surge in state legislative efforts to create state-specific immigration enforcement policies, each of these threats is significantly magnified, and several additional concerns arise.

- *First,* by creating a patchwork of immigration regimes, states such as Alabama make it substantially more difficult for foreign nationals to understand their rights and obligations, rendering them more vulnerable to discrimination and harassment.
- *Second,* this patchwork creates cacophony as well as confusion regarding U.S. immigration policy, and thereby undermines the United States' ability to speak with one voice in the immigration area, with all its sensitive foreign policy implications.
- *Third,* this patchwork fosters a perception abroad that the United States is becoming more hostile to foreign nationals, corroding a reputation for tolerance, openness, and fair treatment that is critical to our standing in international and multinational fora, our ability to attract visitors, students, and investment from overseas, our influence in a wide range of transnational contexts, and the advancement of our economic and other interests.

11. In light of these broad, overlapping, and potentially unintended ways in which immigration activities can adversely impact our foreign affairs, it is critically important that national immigration policy be governed by a uniform legal regime, and that decisions regarding

the development and enforcement of immigration policy be made by the national government. In all matters that are closely linked to U.S foreign relations, including immigration, the United States is constantly engaged in weighing multiple competing considerations and choosing among priorities in order to develop an overall foreign policy strategy that will most effectively advance U.S. interests and values. The United States likewise is constantly seeking the support of foreign governments, through a delicately navigated process, across the entire range of U.S. policy goals. Only the federal government has the international relationships and information, and the national mandate and perspective, to be able to appropriately evaluate these choices on a continuing basis in response to fluctuating events on the world stage. The proliferation of state laws advancing state-specific approaches to immigration enforcement represents a serious threat to the national control over immigration policy that effective foreign policy demands.

12. While particular state enactments that incidentally touch on immigration may not implicate foreign affairs concerns or may implicate them only slightly, Alabama's law H.B. 56, even when considered in isolation, more directly and severely impacts U.S. foreign affairs interests by establishing an alternative immigration policy of multiple, interlinking procedural and criminal provisions, all of which manifest Alabama's intention to create a separate regulatory regime and to influence immigration enforcement nationwide. Alabama's effort to set its own immigration policy is markedly different from instances in which states and localities assist and cooperate with the federal government in the enforcement of federal immigration laws. Such a cooperative approach greatly diminishes the likelihood of conflicts with U.S. foreign policy interests. When states and localities work in concert with the federal government, and take measures that are coordinated with federal agencies and in line with federal priorities, the United States retains its ability to speak with one voice on matters of immigration policy, which in turn enables it to keep control of the message it sends to international audiences and to calibrate responses as it deems appropriate, in light of the ever-changing dynamics of foreign relations.

13. In contrast, H.B. 56 pursues a singular policy of criminal enforcement at all costs through, among other things, an extraordinary mandatory verification regime coupled with the effective state criminalization of unlawful presence and numerous other mutually reinforcing sanctions. By so doing, the law has the capacity to cause harassment of foreign nationals; to provoke retaliatory treatment of U.S. nationals overseas; to weaken public support among key constituencies abroad for cooperating with the United States; to endanger our ability to negotiate international arrangements and to seek bilateral, regional, or multilateral support across a range of economic, human rights, security, and other non-immigration concerns; and to be a source of ongoing criticism in international fora. Alabama's effort to set its own immigration policy conflicts with numerous U.S. foreign policy interests and with the United States' ability to speak with one voice in this sensitive area.

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34. H.B. 56 broadly threatens the national government's primacy in setting immigration policy and ensuring that, when the federal government has spoken, its word has weight and can be trusted by the international community. The Alabama law conflicts with or undermines a number of specific foreign policy positions of the United States, including: (1) that we do not ordinarily impose criminal sanctions or other punitive measures on foreign nationals solely for unlawful presence; (2) that we abide by norms of mutuality, hospitality, and respect, as well as the principle of uniformity, in crafting and enforcing our immigration rules; and (3) that we

honor our international legal, political, and moral commitments to protect the human rights of migrants. Foreign governments rely on these policies, and trust that we will treat their nationals accordingly; the United States, in turn, has the credibility and leverage to demand the same. It is because the international community perceives laws like H.B. 56 as reneging on these stated policy positions, which guarantee aliens are not, for example, subjected to legislated homelessness or put in prison solely for seeking work, that so many foreign governments have expressed their displeasure at such laws, and may retaliate in kind. This kind of grievance tarnishes the United States' image and reduces our ability to engage in foreign policy on numerous fronts.

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3. South Carolina

On October 31, 2011, the United States filed suit in the U.S. District Court for the District of South Carolina seeking to block enforcement of portions of an immigration law enacted in South Carolina, Act 69. Complaint, *United States v. South Carolina*, (D. S.C. 2011), available at *www.justice.gov/opa/documents/us-v-sc-complaint.pdf*. As in the cases brought against Arizona and Alabama, the United States again submitted a declaration by the deputy secretary describing the foreign policy concerns of the United States relating to state enforcement of immigration laws. Deputy Secretary Burns' declaration in the U.S. District Court for South Carolina, dated November 3, 2011, is broadly similar to his declaration in the case against Alabama, which is excerpted above. Deputy Secretary Burns' declaration regarding South Carolina's immigration law is available in full at *www.state.gov/s/l/c8183.htm*. On December 22, 2011, the district court granted, in part, the United States' motion for a preliminary injunction against enforcement of several key provisions in the South Carolina law. *United States v. South Carolina*, 2011 WL 6973241 (D. S.C. 2011).

4. Utah

On November 22, 2011, the United States brought another action seeking to enjoin enforcement of new state measures regarding immigration. The United States filed a complaint in the U.S. District Court for the District of Utah arguing that certain parts of a Utah law regulating immigration, H.B. 497, are preempted by federal law and therefore unconstitutional. Complaint, *United States v. Utah* (D. Utah), available at *http://extras.sltrib.com/pdfs/DOJcomplaint.pdf*. As in Arizona, Alabama, and South Carolina, the U.S. State Department supported the Justice Department in its action against Utah. The declaration of Deputy Secretary Burns filed in the district court in Utah, dated December 7, 2011, is available at *www.state.gov/s/l/c8183.htm*. A Justice Department press statement, released on the day the Utah suit was filed, and available at *www.justice.gov/opa/pr/2011/November/11-ag-1526.html*, summarized the actions taken thus far to challenge state immigration laws:

The federal government has the ultimate authority to enforce federal immigration laws and the Constitution does not permit a patchwork of local immigration policies. A state setting its own immigration policy interferes with the federal government's enforcement efforts.

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The Justice Department previously challenged S.B. 1070, H.B. 56, and Act No. 69 on federal preemption grounds in Arizona, Alabama, and South Carolina, respectively. The department continues to review immigration-related laws that were passed in Indiana and Georgia. Courts have enjoined key parts of the Arizona, Alabama, Georgia, and Indiana state laws and temporarily restrained enforcement of Utah's law.

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B. ALIEN TORT CLAIMS ACT AND TORTURE VICTIM PROTECTION ACT

1. Overview

The Alien Tort Claims Act ("ATCA"), also referred to as the Alien Tort Statute ("ATS"), was enacted as part of the First Judiciary Act in 1789 and is now codified at 28 U.S.C. § 1350. It provides that U.S. federal district courts "shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States." The statute was rarely invoked until *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); following *Filartiga*, the statute has been interpreted by the federal courts in cases raising human rights claims under international law. In 2004 the Supreme Court held that the ATCA is "in terms only jurisdictional" but that, in enacting the ATCA in 1789, Congress intended to "enable[] federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). By its terms, this statutory basis for suit is available only to aliens. In an *amicus curiae* memorandum filed in the Second Circuit in *Filartiga v. Pena-Irala,* the United States described the ATCA as one avenue through which "an individual's fundamental human rights [can be] in certain situations directly enforceable in domestic courts." Memorandum for the United States as Amicus Curiae at 21, *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980) (No. 79-6090).

The Torture Victim Protection Act ("TVPA"), which was enacted in 1992, Pub. L. No. 102-256, 106 Stat. 73, appears as a note to 28 U.S.C. § 1350. It provides a cause of action in federal courts against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation" for individuals, including U.S. nationals, who are victims of official torture or extrajudicial killing. The TVPA contains an exhaustion requirement and a ten-year statute of limitations.

The following entries discuss 2011 developments in a selection of cases brought under the ATCA and the TVPA. The first entry (*Kiobel*) covers developments in a case in

which the United States participated in 2011. The second two entries cover developments in cases in which the United States participated previously but did not take part in proceedings in 2011.

2. Kiobel v. Royal Dutch Petroleum

In December 2011, the United States filed a brief as *amicus curiae* in the Supreme Court of the United States in the case *Esther Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491. The U.S. brief argued that a corporation can be held liable in a federal common law action brought under the ATS. The case was brought by former residents of a region in Nigeria where defendant corporations, through a Nigerian subsidiary, were engaged in oil exploration and production. Plaintiffs alleged that defendants aided and abetted, or were otherwise complicit in, human rights abuses by Nigerian military and police forces that violated international human rights law. The district court had dismissed the case, in part. On interlocutory appeal, the court of appeals dismissed the complaint in its entirety for lack of subject matter jurisdiction, reasoning that corporate liability had not attained universal acceptance among nations so as to represent customary international law. The U.S. brief first argued that the issue of corporate liability was a question of the merits rather than subject matter jurisdiction and, second, urged the Supreme Court to determine that a corporation can be held liable in a federal common law action under the ATS for violating the law of nations. Excerpts from the United States brief appear below (with most footnotes and citations to the record omitted).[*]

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II. A CORPORATION CAN BE HELD LIABLE IN A FEDERAL COMMON LAW SUIT BASED ON THE ALIEN TORT STATUTE FOR VIOLATING THE LAW OF NATIONS

The second question presented is whether a corporation can be held liable in a suit under the ATS for violating the law of nations. As the court of appeals recognized, a number of other questions, unanswered by this Court, are implicated by this case and other ATS cases. These include: whether or when a cause of action should be recognized for theories of secondary liability such as aiding and abetting, see *Aziz*, 658 F.3d at 395-401 (citing cases); whether or when a cause of action should be recognized under U.S. common law based on acts occurring in a foreign country, see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727-728 (2004); and whether or when congressional legislation such as the Torture Victim Protection Act of 1991 (TVPA),

[*] Editor's note: On March 5, 2012, the United States Supreme Court issued an order in the *Kiobel* case directing the parties to file supplemental briefs addressing the issue of "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." *Digest 2012* will discuss the United States supplemental brief addressing this issue.

Pub. L. No. 102-256, 106 Stat. 73, should be taken into account in determining the scope and content of common law claims to be recognized under the ATS, cf. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 23-37 (1990). Those questions are important, but they were not decided by the court of appeals in this case and should not be answered by this Court here. And the holding on the issue the court of appeals did decide—that a corporation may not be held liable—is categorical and applies to all suits under the ATS, regardless of the theory of liability, the locus of the acts, the involvement of a foreign sovereign, or the character of the international-law norm at issue.

To isolate the consideration of the court of appeals' holding from those other issues, and to tie the corporate liability issue to the origins of the ATS, consider (for example) a civil suit brought by a foreign ambassador against a U.S. corporation for wrongs committed against the ambassador by the corporation's employees in the United States. Cf. *Sosa*, 542 U.S. at 716-717 (discussing assault on foreign ambassador to the United States in *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784)). Or consider a suit against a corporation based on piracy committed by the corporation's employees. Cf. *id.* at 720, 724. Whether a federal court should recognize a cause of action in such circumstances is a question of federal common law that, while informed by international law, is not controlled by it.

A. Whether A Corporation May Be Held Liable In A Suit Based On The ATS Should Be Determined As A Matter Of Federal Common Law

1. This Court explained in *Sosa* that, although the ATS "is in terms only jurisdictional," and does not create a statutory cause of action, "at the time of enactment" it "enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." 542 U.S. at 712. At that time, the category encompassed "three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* at 724; see *id.* at 715, 720. Although the Court concluded that the door had not been closed "to further independent judicial recognition of actionable international norms" dictated by "the present-day law of nations," *id.* at 725, 729, it identified certain cautionary factors to be considered in deciding whether to recognize such a claim under federal common law, *id.* at 725-728. The Court made clear, however, that "[w]hatever the ultimate criteria for accepting a cause of action subject to jurisdiction under [Section] 1350," one essential criterion is that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than [those] historical paradigms." *Id.* at 732. Accordingly, "any claim based on the present-day law of nations" must at least "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of th[ose] 18th-century paradigms." *Id.* at 725.

2. Contrary to the court of appeals' conclusion, in determining whether a federal common law cause of action should be fashioned, courts are not required to determine whether "corporate liability for a 'violation of the law of nations' is a norm 'accepted by the civilized world and defined with a specificity' sufficient to provide a basis for jurisdiction under the ATS." In so holding, the court of appeals confused the threshold limitation identified in *Sosa* (which does require violation of an accepted and sufficiently defined substantive international-law norm) with the question of how to enforce that norm in domestic law (which does not require an accepted and sufficiently defined practice of international law). That confusion stems in large part from the court's misreading of footnote 20 in the *Sosa* opinion.

In footnote 20, the Court explained that "[a] related consideration"—*i.e.*, a consideration related to "the determination whether a norm is sufficiently definite to support a cause of action"—"is whether international law extends the scope of liability for a violation of a given

norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20. The Court then proceeded to compare two cases exemplifying that "consideration." The first was Judge Edwards' concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), in which he found (in this Court's words) an "insufficient consensus in 1984 that torture by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20. The second was *Kadic* v. *Karadžić*, 70 F.3d 232, 239-241 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996), in which the court found (again, in this Court's words) a "sufficient consensus in 1995 that genocide by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20. In a concurring opinion, Justice Breyer summarized footnote 20 as requiring that "[t]he norm * * * extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." *Id.* at 760.

From *Sosa*'s footnote 20, it is clear that "*if* the defendant is a private actor," *Sosa*, 542 U.S. at 732 n.20 (emphasis added), a court must consider whether private actors are capable of violating the international-law norm at issue. The distinction between norms that apply only to state actors and norms that also apply to nonstate actors is well established in customary international law. For example, the Torture Convention defines "torture" as certain conduct done "by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 4 (1988), 1465 U.N.T.S. 85, 113-114 (Torture Convention). In contrast, genocide and war crimes do not require state involvement. See, *e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, art. II, *adopted* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (Genocide Convention); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 (Common Article 3). Because certain international-law obligations *do* distinguish between state actors and non-state actors, to identify an accepted international-law norm with definite content for *Sosa* purposes, a court must conduct a norm-by-norm assessment to determine whether the actor being sued is within the scope of the identified norm.

The court of appeals, however, read *Sosa*'s footnote 20 more broadly in two respects. First, it misread the distinction between state actors and non-state actors—a distinction well recognized in international law—as a basis for drawing a distinction between natural and juridical persons—one that finds no basis in the relevant norms of international law. In fact, the footnote groups all private actors together, referring to "a private actor such as a corporation *or* individual." *Sosa*, 542 U.S. at 732 n.20 (emphasis added). And, notably, the defendant in *Kadic* was a natural person, 70 F.3d at 236, whereas the defendants in *Tel-Oren* were not, 726 F.2d at 775.

Second, the court of appeals misread footnote 20 to require not just an international consensus regarding the content of an international-law norm, but also an international consensus on how to enforce a violation of that norm. That reading reflects a misunderstanding of international law which establishes the substantive standards of conduct and generally leaves the means of enforcing those substantive standards to each state. See Louis Henkin, *Foreign Affairs and the United States Constitution* 245 (2d ed. 1996) ("International law itself * * * does not require any particular reaction to violations of law."); *Flomo* v. *Firestone Natural Rubber Co.*,

643 F.3d 1013, 1020 (7th Cir. 2011) (same)[**]; *Doe* [v. *Exxon Mobil Corp.*], 654 F.3d at 41-42 (same). Once it is established that the international norm applies to conduct by an actor, it is largely up to each state to determine for itself whether and how that norm should be enforced in its domestic law.

That is not to say that international law is irrelevant to all questions of enforcement. And, as discussed in Part II.B.3, *infra*, international law informs the court's exercise of its federal common law authority in determining whether to recognize a cause of action to remedy a violation of an international-law norm that otherwise meets the *Sosa* threshold—and in deciding what the contours of that cause of action should be. But that is a different task from satisfying *Sosa*'s threshold requirement of demonstrating the existence of an accepted and well-defined *substantive* international law norm. Cf. *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 423 (1964) ("Although it is, of course, true that United States courts apply international law as part of our own in appropriate circumstances, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.").

To satisfy *Sosa*, a plaintiff in an ATS suit must allege conduct that violates a substantive norm of international law accepted by civilized nations and defined with the requisite degree of specificity. To the extent that substantive norm is defined in part by the identity of the perpetrator, then the defendant must fall within that definition. Similarly, if the substantive norm is defined in part by the identity of the victim or the locus of events, then conduct committed against a different victim or in a different locale could not violate that norm and a suit under the ATS could not stand. See *Sarei* v. *Rio Tinto, PLC*, No. 02-56256, 2011 WL 5041927, at *43 (9th Cir. Oct. 25, 2011) (McKeown, J., concurring in part and dissenting in part) ("[T]he handful of international law violations that may give rise to an ATS claim are often restricted by the identity of the perpetrator, the identity of the victim, or the locus of events."), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011).

3. At the present time, the United States is not aware of any international-law norm, accepted by civilized nations and defined with the degree of specificity required by *Sosa*, that requires, or necessarily contemplates, a distinction between natural and juridical actors. See, *e.g.*, Torture Convention art. 1 (defining "torture" to include "*any act* by which severe pain or suffering * * * is intentionally inflicted on a person" for certain reasons, "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity") (emphasis added); Genocide Convention art. 2 (defining genocide to include "any of the following acts" committed with intent to destroy a group, without regard to the identity of the perpetrator); Common Article 3 (prohibiting "the following acts," without regard to the identity of the perpetrator).

Both natural persons and corporations can violate international-law norms that require state action. And both natural persons and corporations can violate international-law norms that

[**] Editor's note: In 2011, the U.S. Court of Appeals for the Seventh Circuit also concluded that corporations can be liable under the ATS. *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011). The plaintiffs in the case were Liberian children who alleged that Firestone used hazardous child labor at its rubber plant in Liberia in violation of customary international law. After deciding that corporate liability exists under the ATS, the *Flomo* court proceeded to determine that the allegations of the plaintiffs did not present an adequate basis for finding a violation of customary international law, leading the court to affirm the district court's dismissal of the case.

do not require state action. The court of appeals examined the question of corporate liability in the abstract, and therefore did not address whether any of the particular international-law norms identified by petitioners (or recognized by the district court as satisfying *Sosa*'s "demanding" standard, 542 U.S. at 738 n.30) exclude corporations from their scope. Because corporations (or agents acting on their behalf) can violate the types of international-law norms identified in *Sosa* to the same extent as natural persons, the question becomes whether or how corporations should be held accountable as a matter of federal common law for violations that are otherwise actionable in private tort suits for damages under the ATS.

B. Courts May Recognize Corporate Liability As A Matter Of Federal Common Law In Actions Under The ATS

This Court has instructed courts to act as "vigilant doorkeep[ers]," *Sosa*, 542 U.S. at 729, and to exercise "great caution" before "adapting the law of nations to private rights," *id.* at 728. Such restraint, however, does not justify a categorical exclusion of corporations from civil liability under the ATS.

1. The text of the ATS does not support the court of appeals' categorical bar. To the contrary, whereas the ATS clearly limits the class of plaintiffs to aliens, 28 U.S.C. 1350, it "does not distinguish among classes of defendants," *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). The historical context supports the different textual treatment of ATS plaintiffs and defendants. As explained in *Sosa*, the ATS was passed by the First Congress in 1789, after the well-documented inability of the Continental Congress to provide redress for violations of treaties and the laws of nations for which the United States might be held accountable. See 542 U.S. at 715-717. The Continental Congress had "implored the States to vindicate rights under the law of nations," but only one State acted on that recommendation. *Id.* at 716. Notably, although that resolution "dealt primarily with criminal sanctions," William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed In Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491 (1986) (Casto), the Continental Congress took the further step of recommending that the States also make available suits for damages, 21 *Journals of the Continental Congress 1774-1789*, at 1136-1137 (Gillard Hunt ed. 1912) (Continental Congress). And, indeed, the resolution provided that while it might at times be necessary "to repair out of the public treasury" to compensate for injuries caused by individuals, "the author of those injuries" should ultimately "compensate the damage out of his private fortune." Continental Congress 1136.

Events like the "so-called Marbois incident of May 1784"—"in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French [Legation] in Philadelphia"—exposed the inability of the national government to redress law-of-nations violations. *Sosa*, 542 U.S. at 716-717; Casto 491-492 & n.138. A "reprise of the Marbois affair," *Sosa*, 542 U.S. at 717, occurred in 1787, during the Constitutional Convention, when a New York City constable entered the residence of a Dutch diplomat with a warrant for the arrest of one of his domestic servants. Casto 494. And, again, the "national government was powerless to act." *Ibid.*

From this history, the *Sosa* Court concluded that the First Congress intended the ATS to afford aliens a *federal* forum in which to obtain redress for the "relatively modest set of actions alleging violations of the law of nations" at the time. 542 U.S. at 720; see *id.* at 724 (noting importance of "private remedy"); see *Tel-Oren*, 726 F.2d at 782 (Edwards, J., concurring) (detailing evidence that the intent of the ATS "was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international

crisis"). Consistent with the recommendations of the Continental Congress, the First Congress both criminalized certain law-of-nations violations (piracy, violation of safe conducts, and infringements on the rights of ambassadors), see Act of Apr. 30, 1970, ch. 9, § 8, 1 Stat. 113-114 (1790 Act); *id.* § 28, 1 Stat. 118, and in the ATS provided jurisdiction over actions by aliens seeking civil remedies.

As the D.C. Circuit recently explained, there is no good "reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so." *Doe*, 654 F.3d at 47. Given the apparent intent to provide compensation to the injured party through a civil damages remedy in a federal forum (rather than simply address the international affront through criminal prosecution or diplomatic channels), there is also no good reason to conclude that the First Congress would have wanted to allow the suit to proceed only against the potentially judgment-proof individual actor, and to bar recovery against the company on whose behalf he was acting. Take, for example, the 1787 incident involving the Dutch diplomat. If entry were made into his residence by the agent of a private process service company for the purpose of serving a summons on the diplomat, the international affront might equally call for vindication (and compensation) through a private suit against that company. Cf. 1790 Act, §§ 25-26, 1 Stat. 117-118 (providing that "any writ or process" that is "sued forth or prosecuted by any person" against an ambassador or "domestic servant" of an ambassador shall be punished criminally and would constitute a violation of "the laws of nations"). And later, in opining on a boundary dispute over the diversion of waters from the Rio Grande, Attorney General Bonaparte stated that citizens of Mexico would have a right of action under the ATS against the "Irrigation Company." 26 Op. Att'y Gen. 250, 251 (1907).

2. More generally, the proposition that corporations are "deemed persons" for "civil purposes," and can be held civilly liable, has long been recognized as "unquestionable." *United States* v. *Amedy*, 24 U.S. (11 Wheat.) 392, 412 (1826); see *Beaston* v. *Farmers' Bank of Del.*, 37 U.S. (12 Pet.) 102, 134 (1838). Corporations are capable of "suing and being sued." 1 Stewart Kyd, *A Treatise on the Law of Corporations* 13 (1793); see 1 William Blackstone, *Commentaries on the Laws of England* 463 (1765) (corporations may "sue or be sued * * * and do all other acts as natural persons may"); *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 125 (2003) (detailing "common understanding" that corporations have long had the "capacity to sue and be sued").

As particularly relevant here, corporations were capable of being sued in tort. This Court has explained that, "[a]t a very early period, it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found, in the judicial annals of both countries, of suits for torts arising from the acts of their agents, of nearly every variety." *Philadelphia, Wilmington,& Balt. R.R.* v. *Quigley*, 62 U.S. (21 How.) 202, 210-211 (1859); see *Chestnut Hill & Spring House Turnpike Co.* v. *Rutter*, 4 Serg. & Rawle 6, 17 (Pa. 1818) ("[F]rom the earliest times to the present, corporations have been held liable for torts."). In 1774, for example, Lord Mansfield's opinion for the Court of King's Bench held that a corporation could be held liable in damages for failing to repair a creek that its actions had rendered unnavigable. See *Mayor* v. *Turner*, (1774) 98 Eng. Rep. 980. Early American courts followed suit. See, *e.g.*, *Chestnut Hill*, 4 Serg. & Rawle at 17; *Gray* v. *Portland Bank*, 3 Mass. (2 Tyng) 363 (1807); *Riddle* v. *Proprieters of the Locks*, 7 Mass. (6 Tyng) 168 (1810); *Townsend* v. *Susquehanna Turnpike Co.*, 6 Johns. 90 (N.Y. Sup. Ct. 1809).

Holding corporations liable in tort for violations of the law of nations of the sort otherwise actionable in a federal common law action based on the ATS is thus consistent with the common law backdrop against which the ATS was enacted and subsequently amended. As even the Second Circuit recognized, this Nation's "legal culture" has "long" grown "accustomed" to imposing tort liability on corporations. Pet. App. A8-A9; see *Doe*, 654 F.3d at 48 ("The general rule of substantive law is that corporations, like individuals, are liable for their torts.") (citation omitted); 9A William M. Fletcher, *Cyclopedia of the Law of Corporations* § 4521 (2008 rev. ed.) (discussing tort suits against corporations). And the *Sosa* Court's cautionary admonitions provide no reason to depart from the common law on this issue.

3. International law does not counsel otherwise. As discussed (see Part II.A, *supra*), international law does not dictate a court's decision whether to recognize, and how to define, a federal common law cause of action to enforce a law-of-nations violation of the sort deemed potentially actionable under *Sosa*. But to the extent international law does speak to an issue, it should inform the court's exercise of its residual common law discretion. Here, nothing in international law counsels in favor of the Second Circuit's categorical bar to corporate liability.

The court of appeals relied heavily on its understanding that "no corporation has ever been subject to *any* form of liability under the customary international law of human rights." But, even if correct, the court of appeals drew the wrong conclusion from that observation.

First, each international tribunal is specially negotiated, and limitations are placed on the jurisdiction of such tribunals that may be unrelated to the reach of substantive international law. See, *e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, art. 10 (Rome Statute) ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."). Thus, the fact that no international tribunal has been created for the purpose of holding corporations *civilly* liable for violations of international law does not contribute to the analysis, because the same is true for natural persons. Cf. *Flomo*, 643 F.3d at 1019 ("If a plaintiff had to show that civil liability for such violations was itself a norm of international law, no claims under the [ATS] could ever be successful, even claims against individuals.").

Second, the reason why the jurisdiction of international *criminal* tribunals has thus far been limited to natural persons appears to be because of certain features unique to *criminal* punishment. That limitation is not indicative of a general prohibition against holding corporations (as compared to natural persons) accountable for violations of international law. For example, the Rome Statute, which established the International Criminal Court (ICC), was based on the principle of complementarity. Rome Statute preamble ¶ 10. The ICC was to assume criminal jurisdiction only when national courts were unable (or unwilling) to genuinely investigate or prosecute certain international crimes. See Rome Statute art. 17. Because many foreign states do not criminally prosecute corporations under their domestic law for any offense, extending the ICC's criminal jurisdiction to include corporations would have rendered complementarity unworkable. Notably, however, several countries (including the United Kingdom and the Netherlands) that have incorporated the Rome Statute's three crimes (genocide, crimes against humanity, and war crimes) into their domestic jurisprudence themselves impose criminal liability on corporations and other legal persons for such offenses. See Anita Ramasastry & Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law—A Survey of Sixteen Countries—Executive Summary* 13-16, 30 (2006), *http://www.fafo.no/pub/rapp/536/536.pdf*.

With respect to Nuremberg in particular, while it is true that no private organization or corporation was criminally charged or convicted, it is equally true that nothing in the history of the Nuremberg proceedings suggests that juridical persons could never be held accountable (through criminal prosecution or otherwise) for violating international law. See Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009) (noting that corporate liability was "explored, and was never rejected as legally unsound," and that corporations were not prosecuted at Nuremberg "not because of any legal determination that it was impermissible under international law"); cf. Diarmuid Jeffreys, *Hell's Cartel* 405-406 (2008) (noting that German court in subsequent suit, apparently brought under German law, held that "[t]he fundamental principles of equality, justice, and humanity must have been known to all civilized persons, and the [I.G. Farben chemical company in its current liquidated form] cannot evade its responsibility any more than can an individual").

Third, international tribunals are not the sole (or even the primary) means of enforcing international-law norms. Until the twentieth century, domestic law and domestic courts were the primary means of implementing customary international law. And holding corporations accountable if they violate the law of nations is consistent with international law. Today, a number of international agreements (including some that the United States has ratified) require states parties to impose liability on corporations for certain actions. See, *e.g.*, Convention Against Transnational Organized Crime, art. 10(1), Nov. 15, 2000, S. Treaty Doc. No. 16, 108th Cong., 2d Sess. (2004), 2225 U.N.T.S. 209; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, S. Treaty Doc. No. 43, 105th Cong., 2d Sess. (1998), 37 I.L.M. 1 (1998); see also, *e.g.*, *Doe*, 654 F.3d at 48-49 & n.35. As the Chairman of the Rome Statute's Drafting Committee explained, "all positions now accept in some form or another the principle that a legal entity, private or public, can, through its policies or actions, transgress a norm for which the law, whether national or international, provides, at the very least damages * * * and other remedies such as seizure and forfeiture of assets." M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 379 (2d rev. ed. 1999).

* * * *

3. Doe v. Exxon Mobil

In 2011, the U.S. Court of Appeals for the District of Columbia Circuit also decided a case involving the question of corporate liability under the ATS. *Doe v. Exxon Mobil Corporation*, 654 F.3d 11 (D.C. Cir. 2011). For additional background on the case, see *Digest 2002* at 357-63 (discussing the U.S. statement of interest filed at the district court level); *Digest 2005* at 411-15 (excerpting the district court's decision dismissing the ATS claims in the case); *Digest 2008* at 222-27 (discussing the U.S. *amicus* brief submitted to the U.S. Supreme Court when it considered a petition for certiorari in the case). The United States did not participate in the case at the appeals court level.

4. Sarei v. Rio Tinto

On October 25, 2011, the U.S. Court of Appeals for the Ninth Circuit issued its second en banc decision in *Sarei v. Rio Tinto*, 2011 WL 5041927 (9th Cir. 2011). Plaintiffs, current and former residents of Papua New Guinea, brought the action under the ATS against international mining group Rio Tinto, alleging that Rio Tinto was liable for international law violations by government forces in connection with maintaining the operation of its copper mine in Papua New Guinea during a civil uprising. The case had been dismissed once by the district court and remanded by the Ninth Circuit sitting en banc for a determination on the issue of prudential exhaustion. The appeal decided in 2011 was from the district court's holding that plaintiffs' claims for genocide, crimes against humanity, war crimes, and racial discrimination could proceed without requiring plaintiffs to exhaust local remedies. For additional background on the case, see *Digest 2001* at 337-39 (reprinting the letter from the Department of State in response to the request from the district court for views on the impact of the litigation on U.S. foreign policy); *Digest 2002* at 333–43, 357, 574–75 (discussing and excerpting the original decision by the district court dismissing based on the political question doctrine); *Digest 2006* at 431–50 (discussing and excerpting the Ninth Circuit's decision on appeal and the U.S. brief as *amicus* in support of rehearing); *Digest 2007* at 227-31 (discussing the Ninth Circuit's revision of its 2006 opinion and the U.S. *amicus* brief supporting a second petition for rehearing); *Digest 2008* at 238–44 (discussing and excerpting the Ninth Circuit's en banc decision). The United States did not participate in the appeal decided in 2011. Rio Tinto filed a petition for certioriari in the United States Supreme Court in November 2011 appealing the Ninth Circuit's 2011 en banc decision.

C. ACT OF STATE AND POLITICAL QUESTION DOCTRINES

1. In re Refined Petroleum Products Antitrust Litigation**

On February 8, 2011, the Fifth Circuit affirmed the district court's judgment in an opinion that accepted arguments made by the United States in an August 16, 2010 brief as *amicus curiae*. *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011). The United States argued that the district court properly dismissed class-action lawsuits that alleged antitrust violations in the oil and refined petroleum product industry based on the act of state and political question doctrines. For background on the case and excerpts from the *amicus* brief, see *Digest 2010* at 183-87. Excerpts of the Fifth Circuit's opinion, including

** Editor's note: *In re Refined Petroleum Products Antitrust Litigation* refers to the consolidation of the following separately-filed cases: *Countywide Petroleum Co. v. Petroleos de Venezuela, S.A.* (N.D. Ohio), *Fast Break Foods, LLC v. Saudi Aramco Corp.* (N.D. Ill.), *Green Oil Co. v. Saudi Arabian Oil Co.* (N.D. Ill.), *S-Mart Petroleum Inc. v. Petroleos de Venezuela, S.A.* (D.D.C.), *Spectrum Stores, Inc. v. CITGO Petroleum Corp.* (S.D. Tex.), *Central Ohio Energy, Inc. v. Saudi Arabian Oil Co.* (N.D. Ill.), and *Gokey v. CITGO Petroleum Corp.* (N.D. Tex.).

discussion of the U.S. Government's *amicus* brief, appear below with footnotes omitted.

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* * * *

. . . The Appellants in this case allege that the national oil companies, as well as their subsidiaries, have conspired with OPEC member nations to fix prices of crude oil and refined petroleum products ("RPPs") in the United States, primarily by limiting crude-oil production—that is, by controlling the spigot.

* * * *

The Appellees moved to dismiss both complaints on several grounds. Primarily, they argued that dismissal was proper under Federal Rule of Civil Procedure 12(b)(1), because the claims pose nonjusticiable political questions, and under Rule 12(b)(6), because Appellants failed to state a claim for relief under the act of state doctrine.

* * * *

II.

. . . For reasons similar to those on which we have relied above, we hold alternatively that, under the act of state doctrine, Appellants have failed to state a claim on which relief can be granted.

* * * *

As we have already discussed, Appellees have met their burden of demonstrating that adjudication of this suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources. The Supreme Court has held, albeit in a different factual context, that exploitation of natural resources is an inherently sovereign function. *See United States v. California*, 332 U.S. 19, 38–39 (1947) (allocating the power to drill for oil in the three miles of water off the California coast to the United States instead of California). Indeed, our precedents indicate as much. *See United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977) (noting generally "the control that a sovereign such as the United States has over the resources within its territory. It can exploit them or preserve them or establish a balance between exploitation and preservation.").

In considering whether a merits review would require us to sit in judgment of the acts of foreign sovereigns in their own territories, we find instructive the reasoning of the Ninth Circuit in a similar case. *See Int'l Ass'n of Machinists & Aerospace Workers v. OPEC* ("*IAM*"), 649 F.2d 1354 (9th Cir. 1981). In *IAM*, a labor union brought Sherman Act claims against OPEC and its member nations. *Id.* at 1355. The Ninth Circuit relied on the act of state doctrine in declining to address the merits, explaining that "the availability of oil has become a significant factor in international relations," and illustrating other courts' recognition of the "growing world energy crisis." 649 F.2d at 1360 (citing *Occidental of Umm*, 577 F.2d 1196; *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir. 1977)). The court noted that "the United States has a grave interest in the petro-politics of the Middle East[and] that the foreign policy arms of the executive and legislative branches are intimately involved in this sensitive area." *Id.* at 1361. "While the case is formulated as an anti-trust action, the granting of any relief would in effect amount to an order

from a domestic court instructing a foreign sovereign to alter its chosen means of allocating and profiting from its own valuable natural resources." *Id.*

The claims before us present a similar scenario. The granting of any relief to Appellants would effectively order foreign governments to dismantle their chosen means of exploiting the valuable natural resources within their sovereign territories. Recognizing that the judiciary is neither competent nor authorized to frustrate the longstanding foreign policy of the political branches by wading so brazenly into the sphere of foreign relations, we decline to sit in judgment of the acts of the foreign states that comprise OPEC.

* * * *

2. McKesson v. Iran

On July 27, 2011, the United States filed a brief as *amicus curiae* in the U.S. Court of Appeals for the District of Columbia Circuit in the case *McKesson Corp. v. Islamic Republic of Iran*, No. 10-7174. The United States brief presented three arguments relating to U.S. interests implicated in the case. The section of the brief relating to the act of state doctrine is excerpted below (with most footnotes and citations to the record omitted). The section of the brief discussing the commercial activity exception to the Foreign Sovereign Immunity Act ("FSIA") is discussed in Chapter 10. A final section of the brief, not excerpted, presented the United States' view that the Treaty of Amity between the U.S. and Iran did not preclude the litigation. The U.S. *amicus* brief is available at www.state.gov/s/l/c8183.htm.[***]

* * * *

II. THE ACT OF STATE DOCTRINE DOES NOT APPLY TO THE CORPORATE CONDUCT AT ISSUE HERE.

A. Iran argues that the act of state doctrine prohibits United States courts from adjudicating this dispute. But the Supreme Court has explained that the act of state doctrine applies only "when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *Kirkpatrick*, 493 U.S. at 406; see also, *e.g.*, *Sabbatino*, 376 U.S. at 401 ("The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.").

The district court determined that this litigation does not turn on the validity of Iran's currency control restrictions, but turns instead on the acts of Pak Dairy's board of directors. Given that determination, there is no occasion to apply the act of state doctrine in this case because the conduct of Iran's representatives on Pak Dairy's board of directors cannot fairly be characterized as the sort of "official action by a foreign sovereign," *Kirkpatrick*, 493 U.S. at 406,

[***] Editor's note: On February 28, 2012, the Court of Appeals issued its decision in the case, agreeing with the United States that the act of state doctrine does not preclude adjudication.

or the "public acts [of] a recognized foreign sovereign power," *Sabbatino*, 376 U.S. at 401, to which the act of state doctrine applies.

McKesson has characterized its claim as one for expropriation, but this is not a typical case of a foreign government acting in its sovereign capacity to take private property for a public purpose. As this Court explained, this case instead concerns claims that Iran's representatives on the Pak Dairy board of directors "cut off the flow of capital and other material to McKesson, froze out McKesson's board members, and stopped paying McKesson's dividends." *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1103 (D.C. Cir. 2001) (*McKesson III*), cert. denied, 537 U.S. 941 (2002), vacated in part on other grounds, 320 F.3d 280 (D.C. Cir. 2003). Those facts identify a pattern of conduct by representatives of the government of Iran that cannot properly be deemed the public or official acts of the sovereign government itself.

Iran's conduct had none of the hallmarks of official government action in the sovereign realm. Iran did not pass a law, issue an edict or decree, or engage in other formal governmental action explicitly taking McKesson's property for the benefit of the Iranian public. Instead, Iran's representatives on the board of directors exercised their corporate authority to deny McKesson its rights and dividends. The conduct of a majority shareholder exercising its power through the board of directors of a corporation to deny a minority shareholder the right to participate in and profit from its investment is not an official sovereign act. There is no indication—in light of the district court's rejection of Iran's currency controls defense—that the actions of Iran's representatives on Pak Dairy's board of directors were inextricably intertwined with the implementation of Iranian sovereign policy.

B. The Supreme Court has not defined the specific contours of the "official action" requirement of the act of state doctrine. But the concept is best understood to refer to conduct that is by its nature distinctly sovereign. The courts of appeals have held that genuinely and distinctly sovereign conduct should not be questioned by United States courts. Thus, this Court had "no doubt that issuance of a license permitting the removal of uranium from Kazakhstan is a sovereign act," and therefore held that the act of state doctrine barred litigation challenging the denial of such a license. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (the "right to regulate imports and exports is a sovereign prerogative"). That case also held that a transfer of corporate shares to a state entity was likewise an act of state. *Id*. at 1166. Notably, and in direct contrast to the facts in this case, the Court emphasized that "this transfer and alleged conversion were accomplished pursuant to an official decree of the Republic of Kazakhstan." *Ibid*. ("That kind of expropriation of property is the classic act of state addressed in the case law.").

Similarly, this Court has applied the act of state doctrine where a foreign government finance minister officially ordered payment of a tax to the foreign government. See *Riggs Nat. Corp. v. CIR*, 163 F.3d 1363, 1368 (D.C. Cir. 1999). That order was set forth in a "private letter ruling, which under Brazilian law binds the parties." *Id*. at 1366. More recently, this Court has applied the act of state doctrine to preclude a challenge to the validity of a foreign statute. *Society of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102-103 (D.C. Cir. 2006). Other circuits have similarly emphasized the sovereign character of official action subject to the act of state doctrine. See, *e.g.*, *Spectrum Stores v. Citgo Petroleum Corp*., 632 F.3d 938, 954 (5th Cir. 2011) ("adjudication of this suit would necessarily call into question the acts of foreign governments with respect to exploitation of their natural resources * * * [which] is an inherently sovereign function"), pet. for cert. pending (No. 10-1371 filed May 5, 2011); *In re Philippine Nat'l Bank*, 397 F.3d 768, 773 (9th Cir. 2005) (applying act of state doctrine because litigation would require holding invalid a

forfeiture judgment entered by Phillippine supreme court, in an "action initiated by the Philippine government pursuant to its statutory mandate to recover property allegedly stolen from the treasury," which Ninth Circuit described as "governmental") (internal quotation marks omitted); *Callejo v. Bancomer*, 764 F.2d 1101, 1115 n.15 (5th Cir. 1985) ("Here, there is no question that Mexico's promulgation of the exchange control regulations was invested with the sovereign authority of the state. The decrees announcing the imposition of the controls were issued by the Mexican Ministry of Treasury and Public Credit and by President Lopez Portillo, and were later reiterated in legislative enactments."); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984) (a country acts in a "uniquely sovereign" capacity when it "regulate[s] its natural resources").

Thus, the act of state doctrine generally prohibits United States courts from questioning the validity of a foreign government's exercise of its sovereign authority in a manner unavailable to private entities—such as by enacting a statute, promulgating an official decree, or issuing a binding administrative decision—or a foreign government's official action with respect to distinctly sovereign concerns, such as the regulation of natural resource exploitation. Here, the corporate decisions of Iran's representatives on Pak Dairy's board of directors do not come within those descriptions of sovereign activity, and the act of state doctrine accordingly does not apply.

C. We emphasize that the official action requirement is not equivalent to the determination of foreign sovereign immunity under the FSIA commercial activity exception. Nor does this case present the question whether there is a corollary commercial activity exception to the act of state doctrine. Resolution of that unsettled question is not necessary to a decision that the act of state doctrine does not apply here.

Even apart from the existence of such an exception, a jurisdictional determination that the foreign government's conduct involved commercial activity under § 1605(a)(2) is not by itself a sufficient answer to the act of state inquiry. See *Callejo*, 764 F.2d at 1125-1126 (explaining that inquiries are distinct and applicability of FSIA commercial activity exception does not preclude determination that act of state doctrine applies). Notably, Iran does not appear to argue that the corporate decisions of its representatives on the Pak Dairy board of directors (to the extent the district court held that they were not compelled by currency exchange controls) constitute official actions of the government of Iran.

Apart from the question of a commercial activity exception, the Supreme Court's decision in *Dunhill* provides an instructive example applying the public act (or official action) requirement of the act of state doctrine. There, the majority—including Justice Stevens, who did not endorse a possible commercial activity exception—declined to "draw * * * [the] conclusion" that "the conduct in question was the public act of those with authority to exercise sovereign powers." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 (1976). The Court pointed out that "[n]o statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers." *Id*. at 695. The same can be said for the conduct at issue in this case.

Applying this threshold analytical inquiry—identifying whether the outcome of the litigation would turn upon the effect of official action by a foreign sovereign—demonstrates that the act of state doctrine does not apply according to the terms set forth by the Supreme Court in *Kirkpatrick.* …

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3. Transpacific Passenger Air Transportation Antitrust Litigation

On January 21, 2011, the United States filed a statement of interest in the U.S. District Court for the Northern District of California in a case alleging that 26 airlines—including several national airlines—engaged in a conspiracy to fix prices of transpacific air passenger travel in violation of U.S. antitrust laws. *In re Transpacific Passenger Air Transportation Antitrust Litigation*, No. 3:07-cv-05634-CRB, MDL No. 1913 (N.D. Cal. 2011). Several of the defendant airlines filed motions to dismiss, including motions asserting the act of state doctrine. In its statement, filed at the invitation of the court, the United States took no position on whether the act of state doctrine was implicated in the case, suggesting that:

> Fact-finding by a court may cast light on whether the prerequisites of the act of state doctrine are present (e.g., whether the court must decide the validity of an official act, whether the relevant acts taken are "sovereign" acts, and whether the territorial requirements are met) and whether any exceptions to the act of state doctrine apply.

Statement of Interest of the United States, available at *www.state.gov/s/l/c8183.htm*. In its decision on the motions to dismiss, the court referred to the U.S. statement of interest in denying the motions to dismiss based on the act of state doctrine, allowing that the defendants could raise the argument again after conducting discovery in the case, at the summary judgment stage. *In re Transpacific Passenger Air Transportation Antitrust Litigation*, 2011 WL 1753738 (N.D. Cal. May 9, 2011).

4. Zivotofsky

See Ch. 9.C.

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Cross References

Immigration and nationality, **Chapter 1.**
International tribunals, **Chapter 3.C.**
Protection of migrants, **Chapter 6.F.**
Protecting power in Libya, **Chapter 9.A.**
Foreign Sovereign Immunity Act, **Chapter 10.A.**
Foreign official immunity, **Chapter 10.B.**